

No. 70214-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

---

STATE OF WASHINGTON,

Respondent,

v.

SANG T. NGUYEN,

Appellant.

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2014 MAR -5 AM 11:44

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

---

REPLY BRIEF OF APPELLANT

---

SARAH M. HROBSKY  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

**TABLE OF CONTENTS**

A. ARGUMENT ..... 1

**1. Failure to instruct the jury that the State bore the burden of proving accomplice liability beyond a reasonable doubt requires reversal.** ..... 1

**2. The instructional error is properly before this court.** ..... 3

B. CONCLUSION ..... 4

**TABLE OF AUTHORITIES**

**United States Supreme Court Decisions**

*Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824,  
17 L.Ed.2d 705 (1967) ..... 4

*Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078,  
124 L.Ed.2d 182 (1993) ..... 3

**Washington Supreme Court Decisions**

*City of Seattle v. Patu*, 147 Wn.2d 717, 58 P.3d 273 (2003) ..... 3

*State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002) ..... 4

*State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000) ..... 1

*State v. Williams-Walker*, 167 Wn.2d 889, 225 P.3d 913 (2010) ..... 4

**Washington Court of Appeals Decisions**

*State v. Peters*, 163 Wn. App. 836, 261 P.3d 199 (2011) ..... 3

*State v. Smith*, 174 Wn. App. 359, 298 P.3d 785 (2013) ..... 3

*State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999).

*State v. Teaford*, 31 Wn. App. 496, 644 P.2d 136 (1982) ..... 2

*State v. Teal*, 117 Wn. App. 831, 73 P.3d 402 (2003),  
*aff'd*, 152 Wn.2d 333, 96 P.3d 974 (2004) ..... 1, 2

**Rule**

RAP 2.5 ..... 3

A. ARGUMENT

**1. Failure to instruct the jury that the State bore the burden of proving accomplice liability beyond a reasonable doubt requires reversal.**

The jury instructions relieved the State of its burden of proving accomplice liability beyond a reasonable doubt. *See State v. Teal*, 117 Wn. App. 831, 839, 73 P.3d 402 (2003), *aff'd*, 152 Wn.2d 333, 96 P.3d 974 (2004) (“Accomplice liability, though not an ‘element,’ must still be proved by the State beyond a reasonable doubt in order for a jury to convict.”) (citing *State v. Cronin*, 142 Wn.2d 568, 579-82, 14 P.3d 752 (2000)). Here, the jury was instructed the State bore the burden of proving every “element” of the crime beyond a reasonable doubt. CP 28 (Instruction No. 3). The “to convict” instruction, without any reference to accomplice liability, instructed the jury that the State bore the burden of proving beyond a reasonable doubt “the following elements of the crime.” CP 33 (Instruction No. 8). The jury was also provided an instruction that defined accomplice liability, but the instruction did not include that the State bore the burden of proving accomplice liability beyond a reasonable doubt. Therefore, the instructions, read as a whole, failed to inform the jury of the State’s burden as to accomplice liability, in violation of Mr. Nguyen’s right to trial by jury and to proof beyond a reasonable doubt.

This issue was not addressed in *State v. Teaford*, 31 Wn. App. 496, 644 P.2d 136 (1982) or *Teal*. In *Teaford*, the defendant's "particular complaint is that the jury could have found him guilty of robbery and assault without finding he was an accomplice because his status as an accomplice was not listed *as an additional element* in the instructions defining those crimes." 31 Wn. App. at 500 (emphasis added).

Similarly, in *Teal*:

Teal's argument can be summarized as follows: the purpose of the "to convict" instruction is to set forth the elements of the charge which the State must prove beyond a reasonable doubt. When the State employs a theory of accomplice liability, the "to convict" instruction must communicate that the elements can be established by the conduct of the defendant *or an accomplice*. If the "to convict" instruction refers only to the conduct of the defendant, accomplice liability is beyond the scope of the instruction, and the State assumes the burden of proving that the defendant's conduct established all the elements of the crime without reference to the conduct of an accomplice.

117 Wn. App. at 837 (emphasis in original). By contrast, here, Mr. Nguyen does not argue that accomplice liability is an element of the substantive offense or that it must be included in the "to convict" instruction. Rather, he argues that the jury instructions must make clear the State's burden of proving accomplice liability beyond a reasonable doubt, in addition to its burden to prove the elements of the substantive

offense beyond a reasonable doubt. Thus, this issue is not controlled by *Teaford* and *Teal* and the State's reliance on those cases is misplaced.

**2. The instructional error is properly before this court.**

Instructional error that relieves the State of its burden of proof is an issue of constitutional magnitude that may be raised for the first time on appeal. *State v. Peters*, 163 Wn. App. 836, 847, 261 P.3d 199 (2011); RAP 2.5(a). Moreover, such error is structural and is not subject to a harmless error analysis. *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); *State v. Smith*, 174 Wn. App. 359, 368, 298 P.3d 785 (2013). Here, because the instructions relieved the State of its burden of proving accomplice liability beyond a reasonable doubt, reversal is automatically required.

The State incorrectly argues Mr. Nguyen invited the error. Br. of Resp. at 6-7. "Invited error" arises when a party requests an instruction and then later complains that the requested instruction was given. *City of Seattle v. Patu*, 147 Wn.2d 717, 721, 58 P.3d 273 (2003); *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). Here, Mr. Nguyen does not challenge the giving of any of his proposed instructions.<sup>1</sup> Therefore, the invited error doctrine does not apply.

---

<sup>1</sup> Mr. Nguyen proposed instructions on conspiracy to deliver a controlled substance as a lesser included offense. CP 41-49.

A constitutional error is presumed prejudicial unless the State can show “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Instructional error on accomplice liability is not harmless beyond a reasonable doubt, unless uncontroverted evidence established the defendant acted as a principal. *State v. Williams-Walker*, 167 Wn.2d 889, 917-18, 225 P.3d 913 (2010); *State v. Brown*, 147 Wn.2d 330, 341-42, 58 P.3d 889 (2002). Here, the State expressly relied on accomplice liability to demonstrate dominion and control and argued to the jury that the evidence supported a conviction of Mr. Nguyen either as a principal or as an accomplice to Ms. Alojasin. RP 421, 500-01. In light of the evidence that Mr. Nguyen never possessed the cocaine, and the State’s reliance on accomplice liability to support a guilty verdict, the State cannot establish that the instructional error was harmless beyond a reasonable doubt. Reversal is required.

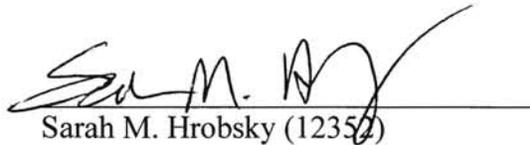
B. CONCLUSION

The failure to instruct the jury on the State’s burden of proof for accomplice liability violated Mr. Nguyen’s constitutional right to trial by jury and to proof of every fact necessary for a conviction beyond a reasonable doubt. For the foregoing reasons, and for the reasons set forth

in the Brief of Appellant, Mr. Nguyen respectfully requests this Court reverse his conviction for unlawful possession with intent to distribute cocaine.

DATED this 4<sup>th</sup> day of March 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Sarah M. Hrobsky", written over a horizontal line.

Sarah M. Hrobsky (12352)  
Washington Appellate Project (91052)  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

---

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70214-9-I
v.	)	
	)	
SANG NGUYEN,	)	
	)	
Appellant.	)	

---

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 4<sup>TH</sup> DAY OF MARCH, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JENNIFER JOSEPH, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] SANG NGUYEN 847318 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 4<sup>TH</sup> DAY OF MARCH, 2014.



X \_\_\_\_\_

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710